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INTERRELATIONS OF CRIMINAL LAW AND TORTS: I

JEROME HALL

INTRODUCTION

American legal scholarship, beginning particularly with the publication of Holmes' *Common Law*, has stressed the prospects of important scientific development by implying an underlying unity in the law of crimes and of torts. Holmes' chief interest in that regard was to establish a theory of objective liability common to both fields, which was the basis for his assertion that "the general principles of criminal and civil liability are the same."¹ Terry discussed both fields of law under the head of Wrongs;² and Beale's casebook and course on Legal Liability also joined what he apparently regarded as common doctrines.

A formal view of the rules strongly supports the premise that the two fields are more or less arbitrary divisions of what is actually a single discipline. At the very outset one encounters many terms which are employed in both fields, *e.g.*, those designating specific torts and crimes, such as assault, battery, conspiracy, criminal conversation, fraud, misrepresentation, defamation, libel, slander, false imprisonment, arrest, nuisance, seduction, trespass. Other common terms such as act, omission, cause, proximate cause, consent, mistake and motive refer to apparently identical doctrines; indeed, the fundamental principles of culpability are expressed by identical words in both fields. The suggested possibilities for unification are that the rules of torts and criminal law which include such common terms may be interrelated as species to genus, *i.e.*, one may be merely a specific instance of the other; or, that the two sets of propositions may be co-ordinate but related to a common genus, *i.e.*, both the torts and criminal law rules may be species of broader doctrines. The rise of modern logical positivism and the con-

1. *THE COMMON LAW* (1881) 44.

2. Terry's analytical bent was not hampered by moral or sociological curiosity. For him, "There is no general principle determining whether a given act or omission shall be a crime or not. Each State makes such acts or omissions crimes as it thinks proper." *SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* (1884) 538.

comitant movement for a Unified Science represent the ultimate phases of a philosophy that, in this particular context, accentuates the hypothesis that the above terms represent identical doctrines and that they subsume identical fact-situations. These implications have been strongly implemented by frequent intermingling of criminal and tort cases by courts and treatise writers.

That scholars of logical bent—the early Holmes, Beale and Terry—were tempted to effect a union of the two fields is less surprising than that the results have been largely negative. The difficulties on the logical side, alone, have been numerous and involved. Thus recent critiques on the criminal law have challenged various traditionally accepted doctrines, *e.g.*, the requirement of *mens rea*. The effect has been to unsettle a relatively well organized body of law. At the same time, other scholars have been debating whether there is any unifying principle in tort law; indeed, that law was less than seventy-five years ago believed to be “not a proper subject for a law book.”³ These questions involve the larger problem of the logical relations of criminal law to all of private law. The initial hypothesis that the one completely parallels the other but that the former consists of more serious aggressions against interests created by the private law, though meriting study, encounters difficulties such as the incidence of numerous legal interests in the penal law itself. Many property rights, *e.g.*, originated in and are defined by the criminal law. Many interests established by the criminal law have no counterpart in or connections with any branch of private law. These matters obviously complicate the problem of logical synthesis. Even the narrower difficulties raised concerning tort-crime interrelations become considerable when we leave analysis of specific terms, such as those noted above, and examine the rules and doctrines in which the terms are found. In addition to these common terms, there are other essential terms that are not distributed in the rules of both fields, and these impose additional limitations on systematization. These various difficulties account for the continued disorganization in both fields and the unavailability of even the elementary logical prerequisites for their precise comparison. Accordingly, any analysis of their interrelations must set sharply limited objectives. It must sample and explore rather than attempt the definitive.

Certainly there are many indications that torts and criminal law are “mixed up together”, in Mr. Churchill’s phrase, and the efforts of distinguished scholars to diagnose the mixture testifies abundantly to the worth, at least, of the attempt. In addition to the largely common terminology noted above, it will be recalled that torts and criminal law

3. Holmes, *Book Review* (1871) 5 AMER. L. REV. 341.

are related in being "non-contractual". This has perhaps been over-emphasized because numerous rules limit the conduct of the parties to a contract; it is possible to formulate contract rules in terms of "obligations," and, also, to state them as reasonable expectations—and thus to diminish, if not eliminate, the formal demarcations from "non-contract" law. Nonetheless, at least as a practical matter, the parties to a contract do enjoy a relatively autonomous sphere of private legislation. Again, torts and criminal law generally forbid action whereas contracts imposes duties which normally require affirmative conduct to confer the desired economic advantages. A formal phase of the typical situations is described in the assertion that contracts deals with rights *in personam* whereas torts and criminal law are concerned with rights *in rem*, but the latter requires qualification as regards certain "relational interests," where the rights inhere in a limited number of specific individuals, and affirmative duties are imposed.

These common features encourage efforts to unite the two fields in a single law of Wrongs on the hypothesis that the required generalizations can be discovered. They render highly persuasive the thesis that for certain scientific, and perhaps, also, for pedagogical purposes, torts and crimes should be so juxtaposed as to permit careful comparisons of harms and sanctions and social functions. Certainly a proven method of discovering the nature of "phenomena" is to compare them with closely related types. In such an endeavor, we learn much more than merely "negative" truths—the process of exploring the finer shades of likeness and unlikeness implements insight into significant facts and dominant principles. To some degree, it should facilitate discovery of generalizations that improve the organization of our presently scattered, disparate knowledge. Such investigation should amplify our understanding of the various functions of torts and criminal law.

To test these hypotheses in the present state of knowledge, and to further these ends, it is necessary to study important differences between torts and criminal law, for the differences raise the crucial issues. Consequently the chief emphasis in this paper will be that the two fields of law differ in very important respects and that their unification by any of the formulas suggested thus far would be devoid of major significance and, possibly, even dangerous to certain values presently implemented by prevailing legal distinctions. But since valid and significant synthesis must remain the scholar's ideal, the analysis will also focus on various more or less defensible generalizations, and, to a lesser degree, on certain narrower problems that, at various points, challenge the theories. In such an endeavor science and experience appear to be irreconcilable foes; the former projects generalizations, whereas the latter particu-

larlizes, almost insinuating that the subtle, diverse meanings of the actual business of life can never be confined in any formula. While, in a sense, it is true, as the epigram has it, that the greater the generalization, the less we know about its subject-matter, this merely postulates that the formula requires supplementation by insight into the detailed actualities. Thus embodied, scientific generalization becomes at once the greatest avenue to understanding as well as the most cogent evidence of man's distinctive mentality. But the *caveat* should be remembered in a comparative study of torts and criminal law.

SUBSTANTIVE AND FORMAL DISTINCTIONS

That immorality is the essence of criminal behavior is a tenet of ancient and traditional philosophy. It was established before the Greeks,⁴ the Platonic Socrates⁵ gave expression to it, as did his eminent successors. Mediaeval scholasticism, culminating in St. Thomas Aquinas,⁶ amplified the foundation of criminal behavior on moral culpability. In Bracton⁷ and the Mirror,⁸ and in succeeding English treatises, including even Hobbes,⁹ the immorality of crime is stressed, and that doctrine was especially elaborated by the 17th and 18th century Natural Law writers. The unvarying corollaries of the traditional axiom were that "the law of nature has it that the evil-doer should be punished,"¹⁰ and that "the natural law requires that each should . . . repair the injury which he occasioned by his tort."¹¹ Since Plato, at least, compensation was distinguished from punishment¹² just as the respective harms were themselves later differentiated in terms of moral culpability.¹³ The long history of the traditional principles may be

4. Cf. NUMBERS XV, 27-28.

5. APOLOGY, 28.

6. SUMMA THEOLOGICA, II-I, Q. 21, Art. 3, II-II, Q. 66, Art. 9; numerous citations are given in ROONEY, LAWLESSNESS, LAW AND SANCTION (1937).

7. f. 136 b. See 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1937) 259; 3 *id.* at 372-3.

8. The title of Book I is OF SINS AGAINST THE HOLY PEACE (Selden Soc. 1895) 5 *et seq.*

9. "A crime is a sin." LEVIATHAN 151.

10. AQUINAS, SUMMA, II-I, Q. 95, A. 2.

11. POTHIER, TREATISE ON OBLIGATIONS (trans. 1802) 76. Cf. GROTIUS, THE RIGHTS OF WAR AND PEACE (ed. Campbell) 195; St. Thomas devotes eight articles to Restitution. See Q. 62, II-II; and Puffendorf wrote practically a modern treatise on the subject. See his, LAW OF NATURE AND NATIONS (1703, Oxford, Kennett) Bk. 3, Ch. 1.

12. LAWS, Bk. IX, 445.

13. Wigmore, *Responsibility for Tortious Acts: Its History*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 479, also HOLDSWORTH, *loc. cit. supra*, note 7. 1 HALE, PLEAS OF THE CROWN (1716) 16, 38; Rede, J. in 1506, cited by HOLMES, THE COMMON LAW 87, and T. Raymond in *Bessey v. Olliot* 467 (1682) cited by HOLMES, THE COMMON LAW 88; cf. FOYER, EXPOSÉ DU DROIT PÉNAL NORMAND AU XIII^e SIÈCLE (Paris, 1931) 46-47.

conveniently regarded as having culminated in Mansfield's dictum that "there is no distinction better known, than the distinction between civil and criminal law."¹⁴

But even as Mansfield wrote the above lines, the ancient tradition was being subjected to the severest sort of criticism by the sharp-witted and intellectually uninhibited father of English Utilitarianism. Since his time, though the tradition persisted, notably in Lorimer and Rutherford, the prevailing current of philosophic thought has relegated it to the limbo of superstitious naïveté. The need to reestablish the ancient doctrines is partly an index of this modern dominance of technical and positivistic theories. But mostly, that need represents a challenge to rediscover the significance of enduring philosophic thought, to reinterpret, reformulate and revise it in light of current problems and by the vision of whatever original insights the individual thinker can contribute.

Modern discussions of tort-crime interrelationships start with Blackstone, and this usual reference is no mere instance of his general vogue. Blackstone stood in England at the very juncture of Natural Law and Legal Positivism. Rather unconsciously and certainly without synthesizing them, he embodied the diverse currents composed of traditional morality as well as those rising on the tide of the Imperative Theory. The entire controversial literature on the nature and relations of tort and crime may be viewed significantly against the fundamental tensions between these legal philosophies. Blackstone recognized the close connections between the law of torts and that of crimes, and his analysis literally incorporates this basic conflict. His criteria for comparison took three directions: legal difference, the nature of the respective harms, and the purposes of criminal and tort law. Crimes are "in violation of public law," torts, of private law; crimes are an infringement of public rights, torts, of civil rights.¹⁵ There is next, without any intimation of incongruence, brief but highly significant insistence on the essential difference of the substantive harms. Crimes affect "the whole community, considered as a community, in its social aggregate capacity . . . they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity."¹⁶ On the other hand, civil injuries are "immaterial to the public."¹⁷ Thirdly, he reiterated the traditional distinction between the ends

14. *Atcheson v. Everitt*, 1 Cowp. 391 (1775); cf. JAMES WILSON, 2 WORKS (Andrews ed.) 376.

15. COMMENTARIES, Bk. III, 2; Bk. IV, 5.

16. *Id.* IV, at 5.

17. *Ibid.*

of the two branches of law: redress of the private injury by way of compensation, and punishment for the public wrong.¹⁸

Blackstone's distinction between public and private law seems to have been suggested by the Roman contrast between *quod ad statum rei Romanae* and *quod ad singulorum utilitatem*. The probability is that the classic phrases designated purely procedural differences—the State or the *Princeps* was a party in the former.¹⁹ Apparently the union of this formalism with the two distinctions that revealed his Natural Law preference did not disturb the illustrious Commentator. Despite the fact that he had one leg in Natural Law philosophy and the other in Analytical Jurisprudence, he was under no exceptional desire to reconcile the diverse implications of his views on torts and criminal law. He accepted the traditional classification of offences into *mala in se* and *mala prohibita*,²⁰ but he felt no need to compare the sanctions of these harms and those of civil wrongs, or otherwise to explore the potentialities of his substantive distinctions with a view to working out a general theory. The unresolved conflicts in his thinking subjected his analysis to easy attack.

Bentham proceeded in quite different directions. He did, indeed, distinguish private from public offenses,²¹ but these terms did not designate torts and crimes. Bentham's basic distinction is between that portion of substantive law which defines rights (or duties) and that which prescribes sanctions. The former is, for him, civil, the latter, penal law. "Thus, a law which should confine itself to the interdiction of murder, would be a civil law; the law which should direct the punishment of death against the murderer would be a penal law."²² The law creating offenses is addressed to all persons, the penal law implies the former, but is addressed only to judges.²³ This analysis constituted a radical repudiation of the traditional distinction between compensation and punishment. For Bentham, all sanctions were "evils"—the only difference was in the degree of evil or pain imposed.²⁴ Hence he recognized only one locus where criminal law could effect any "peculiar production," namely, where "the quantum of affliction would be superior to the utmost that could result from the total loss of all his [the offender's]

18. *Id.* IV, at 6, 7.

19. JONES, HISTORICAL INTRODUCTION TO THE THEORY OF LAW (1940) 145.

20. BLACKSTONE Bk. I, 54, 57.

21. PRINCIPLES OF MORALS AND LEGISLATION, c. 16.

22. III WORKS 160. (This and subsequent references are to Bowring's edition, 1843.) He makes this point more explicit in Vol. IX, 12, left column, 2nd paragraph from bottom. Also see IX, 23.

23. *Id.* at 160.

24. *Cf. id.* IX, at 23.

property.”²⁵ Below the point of such total confiscation of a man’s estate, “is the common domain of both branches.”²⁶ Any moral basis for punishment and possible differentiation of criminal behavior from torts on such grounds were alien to Bentham’s thought. In this regard he was followed rather closely by Austin, who also accepted the utilitarian lumping of civil and penal sanctions as “evils.” Despite his reference to “punishment strictly so called,”²⁷ the significant fact here, too, is Austin’s unconcern to look for any special quality or implication of such punishment.²⁸

Austin rejected Blackstone’s divisions of law, arguing that “the terms ‘public’ and ‘private’ may be applied indifferently to *all* Law.”²⁹ He repudiated the distinction between torts and crimes on the basis of their respective tendencies, that the harm of the latter is “more extensive.” On the contrary, he asserted that “*All* wrongs [were] in their *remote* consequences *generally* mischievous.”³⁰ “All offences affect the community, and *all* offences affect individuals.”³¹ Finally, though he formally associated punishment with the criminal sanction, and redress with the civil one, he insisted that “the difference between civil injuries and crimes, can hardly be found in any difference between the ends or purposes of the corresponding sanctions.”³² Quite persuasively he pointed out that the paramount end of redress is prevention, no less than that of punishment, even though the immediate object is compensation to the injured person.³³ And he controverted the possible refutation, that whereas civil proceedings had both of the above purposes, criminal proceedings were intended solely to punish, by pointing to penal actions, which, he asserted, were civil actions intended solely to punish, not to compensate the complainant. In effect, Austin rejected every *prin-*

25. *Id.* VII, 6 n. Yet elsewhere he argued that compensation produces more suffering than punishment since the former is accompanied by the regret of bestowing an advantage upon an adversary. *THE RATIONALE OF PUNISHMENT* (1830) 12.

26. *Id.* VII, 6 n. But there are inconsistencies as where he writes: “. . . of sanctions, there are two sorts, *viz.*, the punitive and the remunerative: and the punitive is the only one of the two which is furnished by the penal code as such.” Vol. IX, 12; *Cf.* IX, 23. Also *cf.* *RATIONALE OF PUNISHMENT* (1830) 21.

27. *LECTURES ON JURISPRUDENCE* (Campbell, 4th ed. 1879) 524, 568.

28. Purely as an afterthought Austin notes that he “forgot to say that . . . where the injury is considered as a crime, nothing but the intention of the party, the state of his consciousness, is looked to; where, on the other hand, it is a civil injury, an injury must have been committed. . . .” *Id.* 523. That this distinction is unclear is not nearly so suggestive as is his complete disregard of it in his analysis.

29. *Id.* at 416, 517.

30. *Id.* at 517.

31. *Id.* at 417. He qualified this, *id.* at 517.

32. *Id.* at 520.

33. *Id.* at 520-21.

capium divisionis which Blackstone had put forth as to law, harm, and purpose.

In maintenance of his own position, Austin argued that there were two valid distinctions between crime and tort. In tort "the sanction is enforced at the discretion of the party whose right has been violated," whereas in crime, "the sanction is enforced at the discretion of the sovereign."³⁴ Secondly, crimes are violations of "absolute" duties (which have no corresponding "right"), whereas torts are violations of "relative" duties.³⁵ Whatever may have been Austin's limitations as a moral philosopher, the validity of his formal contribution has been widely accepted, subject only to relatively minor exceptions. Later advocates of the Imperative Theory rather vaguely distinguished punishment from compensation,³⁶ but they, too, manifested little interest in the implications of this distinction for corresponding differences in the respective harms. Terminating with Austin, the major issues involved in the interrelations of crimes and torts had been raised. The traditional theory centered on the immorality of criminal behavior and the consequent fitness of punishment. Blackstone followed the tradition but emphasized the difference in the nature of the harm in terms of social effect or tendencies. The positivists repudiated all of the traditional axioms and especially Blackstone's expression of them.

The general outline of the following analysis may be described briefly by noting the common reference of the issues raised in connection with crime-tort interrelations. These divisions of law consist of propositions, each of which is composed of two basic elements—a description of a harm and a description of a sanction. Each "harm" itself includes two essential components, "culpable conduct" and the "effects" of the culpable conduct, which, of course, need not be physical.³⁷ All analysts of the relations between torts and crimes have dealt with these three basic factors. They have concerned themselves with the questions whether there are essential differences in culpability, in the nature of the effects produced, and in that of the respective sanctions.

HOLMES' THEORY OF OBJECTIVE LIABILITY

By far the most significant analysis of tort-crime interrelations in many respects is found in the first chapters of Holmes' *Common Law*.

34. *Id.* at 518.

35. *Id.* at 68, 413, 518. To like effect, see ALLEN, *LEGAL DUTIES* (1931) 183 ff., and, *contra*, SALMOND, *JURISPRUDENCE* (1924) 240.

36. CLARK, *AN ANALYSIS OF CRIMINAL LIABILITY* (1880) 2-4. But *cf.* AMOS, *SCIENCE OF LAW* (1888) 236-7.

37. For analysis of "harm" see the writer's *Criminal Attempt—A Study of Foundations of Criminal Liability* (1940) 49 *YALE L. J.* 814 ff.; and his *Prolegomena to a Science of Criminal Law* (1941) 89 *U. OF PA. L. REV.* 559-561.

Holmes' contribution goes to the fundamentals of what must comprise any careful study of that problem. In support of certain relevant theories of liability, Holmes probably made out the strongest case possible. In considering Holmes' presentation of those theories in some detail, we shall, therefore, be dealing simultaneously with the chief issues relevant to our general problem.³⁸ That Holmes' analysis is penetrating and subtle is almost gratuitous to observe, but it is also highly unsystematic and even contradictory. The venturesome analyst³⁹ is beset by the further difficulty that, although Holmes' knowledge of the law, even at that time, was very considerable, he frequently indulged a special and sometimes questionable emphasis, or the law has changed since he wrote, *e.g.*, his assumption that threat of immediate death is a defense to a homicide, and his dubious construction of the felony-murder doctrine. His entire discussion is hardly a well-organized exposition; rather it consists of a series of acute analyses of various specific problems. It is only when these individual analyses are carefully pieced together and construed against the general thesis he is propounding that the deficiencies in that thesis or, at least, the debatable areas, can be clearly discerned and appraised.

Holmes' study of early liability, aided by his philosophical predilections, led him to the conclusion that it was built on vengeance which "imports a feeling of blame, and an opinion . . . that a wrong has been done." It was, moreover, confined to intentional harm—"even a dog distinguishes between being stumbled over and being kicked."⁴⁰ He knew of no satisfactory evidence of liability for "accidental consequences." On the contrary, he insisted that "Our system of private liability for the consequences of a man's own act . . . started from the notion of actual intent and actual personal culpability."⁴¹ The striking fact is not so much that later research unanimously contradicts

38. It is impossible to assess the extent of Holmes' influence on the acceptance of "objective liability." But that it has been considerable is indicated by numerous bits of evidence. Thus in a recent article Professor J. W. C. Turner makes certain relevant assertions regarding criminal liability and moral standards, and he cites Stroud, 6 CAMB. L. J. 35. Reference to Stroud reveals that he relied on Holmes. STROUD, *MENS REA* (1914) 10. Cf. SIDGWICK, *THE ELEMENTS OF POLITICS* (1919) 115.

39. It is rather significant that later writers on tort-crime interrelations do not discuss Holmes and do not cite him. Most of the major contributions on this subject are by English writers—Stephen, Kenny, Allen and Winfield. But there are also important essays by American scholars, *e.g.*, Ames, *Law and Morals*, who likewise did not refer to Holmes.

40. COMMON LAW 3. Cf. his later assertion, "The hatred for anything giving us pain . . . which leads even civilized man to kick a door when it pinches his finger. . . ." *Id.* 11.

41. *Id.* at 4.

this general conclusion,⁴² but that Holmes supplemented his historical account with the argument that present law has repudiated this "primitive" rationale and rests not on moral culpability but on an objective non-moral foundation. Thus it would seem, on Holmes' analysis, though not in his evaluation, the history of crime-tort law represents a devolution, a regression from liability based on moral blame to one resting on non-moral standards. The concluding words of his first lecture announce his thesis for contemporary law—he intends to prove that "while the terminology of morals is still retained, the law . . . by the very necessity of its nature, is continually transmuting those moral standards into external and objective ones, from which the actual guilt of the party concerned is wholly eliminated."

The first clue to understanding Holmes' theory of liability is made explicit in his famous aphorism that experience, not logic, has been the major influence in law. A corollary, for him, is that "the secret root from which the law draws all the juices of life . . . [is] of course, considerations of what is expedient for the community concerned."⁴³ The criminal law is but a specific instance that supports this generalization. Whereas vengeance "takes an internal standard, not an objective or external one, and condemns its victim by that,"⁴⁴ modern law has eliminated "actual guilt." Holmes concedes that vengeance still operates in modern society, but it "does not cover the whole ground."⁴⁵ The scientific requirement is a general theory, valid for the entire criminal law. Hence he rejects reformation out of hand, since that theory requires no punishment whatever or very early release in cases where recidivism is extremely unlikely, and, also, at the opposite extreme, where the offender is incurable. Choosing, therefore, between retribution and deterrence, Holmes upholds the latter, "the preventive theory." The logic of his rejection of a moral basis for penal liability is thus apparent; the link with Utilitarianism was clear and fully appreciated by Holmes. In support of his position, he marshals certain facts, and since facts alone cannot sustain any ethical judgment, his own parallel approval must be implied. Thus when he asserts that "No society has

42. "The church, even before the conquest, had been urging that the objective rules of liability which formed the Anglo-Saxon law of crime and tort ought to be modified in accordance with subtler ideas of moral guilt, . . ." Plucknett, *Roman Law and English Common Law* (1939) 3 TORONTO L. J. 43.

"As criminal law develops, it moreover scrutinizes more closely the mental condition of offenders. . . ." KENNY, *OUTLINES OF CRIMINAL LAW* (1936) 27.

Ames, *Law and Morals* (1908) in *SELECTED ESSAYS ON THE LAW OF TORTS* (1924) 3.

See generally WIGMORE, *loc. cit. supra* note 13.

43. COMMON LAW 35.

44. *Id.* at 40.

45. *Id.* at 42.

ever admitted that it could not sacrifice individual welfare to its own existence,"⁴⁶ he means to imply also that that is a valid ethical position. When he speaks of conscription, he implies that its ethical justification is axiomatic, and it does not occur to him that the purpose of the war can make any difference in that judgment. As Holmes proceeds to implement "expediency" he sometimes displays a surprising, and occasionally an even shocking insensitivity, *e.g.*, his reiterated approval of a "justifiable self-preference," and of the conduct of a man on a plank in a sea who will thrust off one who lays hold of it, and his justification of the killing of an innocent person on the ground that the alternative was one's own death. He assumes rather than establishes the answer to numerous other difficult problems in his assertion that, "When the state finds itself in a similar position, it does the same thing."⁴⁷ His uncompromising support of the prevention theory required rejection of any moral basis for criminal liability. The alternative was the utilitarianism which he espoused with occasional, but nonetheless highly significant waverings that at times run into sheer inconsistency.⁴⁸

Holmes' purpose was to establish the validity of his theory by reference to the rules of law. He stressed the disregard of "the personal peculiarities of the individuals concerned."⁴⁹ "If punishment stood on the moral grounds which are proposed for it, the first thing to be considered would be those limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence, and all the other defects which are most marked in the criminal classes."⁵⁰ Not only is this not done, but, on the contrary, "the law does undoubtedly treat the individual as a means to an end, and uses him as a tool to increase the general welfare at his own expense. It has been suggested above, that this course is perfectly proper. . . ."⁵¹

The concrete verification of his theory was, he thought, established by the following doctrines:

46. *Id.* at 43.

47. *Id.* at 44.

48. In 1871, he wrote: "A culpable state of mind is an element in most wrongs; and negligence and wilfulness, into which negligence shades away, express the more common of these states." Review of CAMPBELL, *THE LAW OF NEGLIGENCE* (1871) 5 *AMER. L. REV.* 536.

In *The Common Law*, his clearest expression of the contradictory of his objective theory is on page 50 in the passage beginning "it is not intended to deny that criminal liability as well as civil, is founded on blameworthiness."

There are numerous other passages that, if they do not contradict his chief argument, certainly call for explicit reconciliation, *e.g.*, Holmes did not explain the "exceptional" rules where the tests are "subjective," (see *THE COMMON LAW* 66-74) in relation to his general theory that the law by its very nature, must be external. Cf. *Commonwealth v. Ryan*, 155 Mass. 523, 30 N. E. 364 (1892).

49. *COMMON LAW* at 45.

50. *Ibid.*

51. *Id.* at 46-47.

1. "Even the deliberate taking of life will not be punished when it is the only way of saving one's own."⁵² 2. Ignorance of the law is no defense. 3. The law "takes no account of incapacities unless . . . infancy or madness." This is applied to establish that "the tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions,"⁵³ and, also, to the doctrine 4. That the negligence rules clearly impose an external standard that is quite unrelated to the particular defendant's capacity. 5. With reference to the rules on provocation to homicide, "the law decides on general considerations what provocations are sufficient."⁵⁴

The key terms in his theory of both tort and criminal liability are "external" and "objective." The first need is to grasp Holmes' own meaning as clearly as is possible from a scintillating, epigrammatic analysis that made no pretensions to systematic presentation. Holmes uses the terms "objective" and "external" synonymously. He means by them two utterly different things, and his failure to distinguish them clearly is the chief source of the resulting complexity. By "external" Holmes sometimes means that the data relied upon to form conclusions of fact are observable, sensible. But, for Holmes, the term means, also, and more frequently, that all rules of law are objective standards, *i.e.*, their ultimate reference and significance are "objective" in the sense that they ignore internal facts that constitute the true meanings of the relevant situations.

Both meanings are involved in the statement that "All law is directed to conditions of things manifest to the senses."⁵⁵ In discussing the difference between murder and manslaughter, he states that the law has adopted "external tests"⁵⁶—such as the weapons used and the length of time between the provocation and the act. The substantive rules of law do not run in terms of such circumstances, hence "tests" must here refer to the evidentiary data noted, from which intention and premeditation are inferred. This interpretation is further indicated by his assertion, in connection with arson, that "as soon as intent is admitted to be sufficient, the law is on the high-road to an external standard." Although "external" is used here specifically in relation to the rules, it is clear from his general discussion that Holmes is also insisting that intent can be known only from external evidence. But we need not rely only on inferences. His usage is made explicit where he

52. *Id.* at 47.

53. *Id.* at 50.

54. *Id.* at 61.

55. *Id.* at 49. He refers to this end as "this purely external purpose of the law." *Ibid.* Though this might appear to be a third usage of the term, it is too intimately connected with the first, noted above, to be distinguished from it.

56. *Id.* at 62.

writes that the "law only works within the sphere of the senses . . . the external phenomena, the manifest acts and omissions. . . ." ⁵⁷ What he meant when he wrote of "the very necessity of its [the law's] nature" ⁵⁸ thus becomes clearer.

Holmes' other meaning, namely that legal rules and standards are "external," is employed much more frequently and insistently. The conclusion to his first lecture asserted that the law "is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated." ⁵⁹ "The tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions." ⁶⁰ The law "is wholly indifferent to the internal phenomena of conscience." ⁶¹ He notes the liability in arson for remote consequences "whether they were actually intended or not." ⁶² In discussing provocation he stresses "the objective nature of legal standards." ⁶³ Even malice aforethought does not mean "a state of the defendant's mind. . . . It is, in truth, . . . like . . . negligence. . . ." ⁶⁴

An initial appraisal of Holmes' thesis might induce the conclusion that Holmes rejected mentalist psychology, that he was a forerunner in a sort of behaviorist jurisprudence. But it is perfectly clear that Holmes not only recognized the existence of mentalist states, but that he also employed such common terms as intention, motive and conscience (consciousness) in traditionally accepted ways. This is further evidenced by his discussion of those phases of criminal law where he admitted that actual intent is important, *i.e.*, embodied in the rules. Thus in certain cases of attempt, and in various inchoate crimes such as the purchase of counterfeit dies, "the law goes on a new principle, different from that governing most substantive crimes" ⁶⁵—which presumably comprises "actual guilt." So, too, in larceny, actual intent is required—not "because the law is more anxious not to put a man in prison for stealing unless he is actually wicked, than it is not to hang him for killing another," ⁶⁶ but because "the intent is an index to the external event which probably would have happened" ⁶⁷ (permanent deprivation of property). Thus, also, in burglary, actual intent is re-

57. *Id.* at 110. See also, 108.

58. *Id.* at 38.

59. *Ibid.*

60. *Id.* at 50.

61. *Id.* at 110.

62. *Id.* at 65.

63. *Id.* at 61.

64. *Id.* at 62.

65. *Id.* at 67.

66. *Id.* at 72.

67. *Ibid.*

quired⁶⁸ because it too "is an index to the probability of certain future acts which the law seeks to prevent."⁶⁹ And he conceded, further, that "the question of knowledge is a question of the actual condition of the defendant's consciousness."⁷⁰

Since it is thus clear that Holmes recognized the existence of internal mental states, it is apparent that the fulcrum of his principal thesis is the link between his two usages of "external". Holmes' argument that legal judgments necessarily rest on external phenomena and that the substantive rules of law, with rare exceptions, are themselves "external," is clouded because he sometimes implies that the second asserted fact (externality of rules) is a necessary result of the first. This is suggested, *e.g.*, by the closing words of his first lecture.⁷¹ Their import, certainly a fair inference from his argument generally, is that because rational findings of fact necessarily rest on external evidence, that *therefore* the substantive rules of law must also be "external." As noted, this inference is partially contradicted by Holmes' own discussion of the "exceptions" concerning attempt, larceny, etc. But the difficulties involved in resolving the apparent contradiction⁷² dissolved in Holmes' conviction that the criminal law is non-moral because expediency is *ultima ratio*.

With regard to the nature of evidentiary data, it is hardly necessary to emphasize that Holmes' interpretation represents merely the reassertion of an ancient truth. It finds most elaborate expression in mediaeval thought where the importance of what went on in a man's "heart" was paramount: "Now man, the framer of human law, is competent to judge only of outward acts; because *man seeth those things that appear*, according to 1 Kings xvi. 7: while God alone, the framer of the Divine law, is competent to judge of the inward movements of wills. . . ."⁷³ This is reminiscent of one of the most famous aphorisms in legal history

68. *Id.* at 74.

69. *Ibid.*

70. *Id.* at 56; also *cf.* 62.

71. *Id.* at 38, quoted in the text *supra*, p. 762. This conclusion to the first lecture raises the following dilemma: if, as Holmes argues, the nature of law necessitates external standards and eliminates actual guilt, then early "law," which he holds was subjective, is not law; if the nature of law does not necessitate external standards, objective liability is not inevitable. The significant indication is that many important problems of legal sociology are involved, which Holmes passed over completely.

72. "To argue that intent is discoverable only through behavior, and is therefore not so vital as represented to be, is a flagrant *ignoratio elenchi*, for the issue before us is not the means of discovery but the object to be discovered; and the very fact that the one is an indicator of the other amply proves which is the more significant of the two." ROBACK, *BEHAVIORISM AND PSYCHOLOGY* (1923) 132.

73. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-I, Q. 100 Art. 9. (8 Dominican Fathers' translation 138.) But St. Thomas elsewhere argues that since some men are "prone to vice, and not easily amenable to words, it was neces-

which has come to us from the end of the mediaeval period in Brian's remark that "the thought of man shall not be tried, for the devil himself knoweth not the thought of man."⁷⁴ But Brian was refusing to apply a legal sanction in the absence of any overt conduct, whatever; clearly he did not hold that thought cannot be reliably known from such conduct, although he may have shared the view that "complete" knowledge of inner states is not available. The traditional adherence of the common law to this common sense realism received a pithy reformulation by Bowen one year after publication of Holmes' *Common Law*, in his observation that "the state of a man's mind is as much a fact as the state of his digestion."⁷⁵ The weight of competent opinion, certainly among legal writers, is overwhelmingly opposed to Holmes' predilection regarding the effect of the inevitable externality of evidentiary data upon the nature and validity of rules of law.⁷⁶

Actus non facit reum, nisi mens sit rea is the most general doctrine on culpability in the criminal law. Consequently the chief application of the above analysis of Holmes' theory centers on his insistence that the rules on intentional conduct, which include the *mens rea* doctrine, are objective. The relation of the writer's refutation of that theory to the actual significance of these rules may be briefly indicated. We can view the problem simplified thus—human conduct that is associated causally with certain harms proscribed by law, is labelled "intentional" by triers of the material facts on the basis of knowledge of certain external data. The deliberate suiting of means to ends is traditionally characterized as the operation of the "practical reason," and "intention" designates a distinctive and essential aspect of that process. Given certain facts, we *must* conclude that any and every rational human being in those circumstances did or did not *intend* the results, *i.e.*, the only sense that can be attached to certain situations is communicated by the assertion that the actor "intended" the consequences. Consequently, on the

sary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evil-doing. . . ." *Id.* Q. 95, Art. 1 reprinted in HALL, READINGS IN JURISPRUDENCE (1933) 36-37. This implies that man can judge of the relation of conduct to evil, that decisions based solely on what is external can be supported as rational judgments concerning the goodness or evil of human conduct. SUMMA, II-II, Q. 60 Art. 2. Cf. Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 COLUMBIA LAW REV. 710-711.

74. POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1923) 474-5.

75. Edington v. Fitzmaurice, L. R. 29 Ch. Div. 459, 482 (1882).

76. "We must adopt an external standard in adjudicating upon the weight of the evidence adduced to prove or disprove *mens rea*. That, of course, does not mean that the law bases criminal liability upon non-compliance with an external standard. So to argue is to confuse the evidence for a proposition with the proposition proved by that evidence." 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1937) 374-375; STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND (1863) 75-76; SALMOND, ESSAYS IN JURISPRUDENCE AND LEGAL HISTORY (1891) 142-143.

simple level of the basic mental processes embodied in the adaptation of ordinary means to attain common ends, all human beings—barring serious mental or physical defects—may properly be said to act intentionally under circumstances where any one of them could be said to have acted intentionally. Accordingly, although Holmes' theory is logically unimpeachable on his premise of great disparity between external data and internal states, nonetheless it is factually invalid. For though it is literally true that we can never say more than that, under given conditions, a rational being (and not the defendant) would or would not have "intended," yet for the reasons noted and because modern legal procedure comprises skilful methods of discovering external facts, the probabilities are high, not only that the external facts have been accurately determined, but, also, that their characterization as "intentional conduct" fits the particular defendant on trial.

In its most favorable interpretation, Holmes' theory can be rendered relevant to that view of ethics that takes motivation as its basic criterion, and to that psychology which holds motives inaccessible to outside observation. The refutation of the theory, thus interpreted, so far as externality of rules of law is concerned, takes two directions. Firstly, it challenges the tenet that motivation is unknowable to outsiders. Here the argument parallels that presented above concerning intention, and need not be elaborated further. Secondly, the doctrine that motive is irrelevant in most of the criminal law does not concede that it is unknowable. In such cases as the distraught parent who kills his child to terminate its suffering, or who steals bread to feed his starving family, the motivation is known as well as the intention. Such instances do not illustrate that the legal rules are "external" in Holmes' sense. They represent rather those marginal cases where the absolute value-judgments implied in general rules give way almost entirely before an ethical judgment that all but cancels out moral culpability. Normally the motives that stimulate the legally forbidden conduct are bad. The legal adaptation to the above marginal cases is more or less formal condemnation coupled with a minimum of actual penalization. The point to be stressed is that even in such marginal cases the rules do not represent the dogma Holmes asserted. The most that can be inferred is that the definitional parts of the substantive rules are restricted to certain inner states—those necessarily involved in the forbidden volitional conduct. Undoubtedly this would affect the ethical validity of the consequent legal judgments unless other avenues than those phases of the substantive rules were available to mitigate their rigor. It is true, also, that motives are much more complex than intention and that the passing of ethical judgment requires detailed case histories. But the enor-

mously wide range in penalties stipulated in the substantive rules themselves is concrete proof that judges must grapple with this enormously difficult problem. No other theory can account for such provisions except that which asserts that inner states are knowable and must be considered.

Holmes recognized the peculiar inaccessibility of inner states of mind to direct observation. He saw fit to take the road of rather extreme skepticism, because he apparently believed that there must be great disparity between conclusions of fact based on external conduct and actual inner states.⁷⁷ On this premise any moral basis of legal liability is inadmissible. Holmes' version of psychology implemented a Utilitarianism that held expediency not only embodied in the law, but also adequate. He was thus close kin to Bentham and Austin; none saw any distinctive quality in criminal behavior. None felt the need for any justification of punishment other than "utility." But while Bentham and Austin were simply disinterested in exploring the possibility that criminal wrongs were immoral, Holmes grappled with that tradition and deliberately repudiated it. In Holmes, formal and procedural criteria received less emphasis than in Austin, but his acceptance of Utilitarianism with its corollaries of expediency and deterrence is even more pronounced. In addition, he brought to the earlier legal positivism the full tide of modern social positivism, the biological and evolutionary versions predominating.⁷⁸

While Holmes was encouraging positivistic ideas in this country, the greatest contemporary English scholar of the criminal law was pur-

77. The term "objective" is, of course, replete with ambiguity. In controverting Holmes' theory, it is not intended to suggest that moral principles are "subjective" in the sense of being individual creations or ideas. Ethical principles are themselves external realities, and the product of social life. The issues drawn could be phrased to take account of this fact, but they would remain substantially unchanged in their significance. Holmes' theory was not that the legal tests are external because they incorporated objective principles of ethics. The rules are external, he held, because they ignored actual inner states of mind, and referred solely to external observable data. A complete explanation of the opposing thesis would deal with objective ethics and with the individual's states of cognition and understanding of these principles.

Cf. Seavey, *Negligence—Subjective or Objective?* (1927) 41 HARV. L. REV. 3-5.

78. In the writer's view, the greatest error regarding Holmes is to treat him as a systematic philosopher. In fact there were several Holmeses. The interpretation given in the text above expresses various aspects of the earlier Holmes, the legal scientist and historian. Some of his later papers show a remarkably sensitive idealist, and many of his opinions show that Holmes, living his philosophy in the flesh, could illuminate and foster some of the rarest ideals the human mind has conceived. Perhaps a future biographer of Holmes' intellectual life will be able to shed light on some of the apparent inconsistencies and cross-currents. Cf. Fisch, *Justice Holmes, The Prediction Theory of Law, and Pragmatism* (1942) 39 J. OF PHILOS. 85.

suing a more traditional course. Stephen's *General View* had preceded Holmes' *Common Law* by nineteen years and received the latter's careful attention; his *History of the Criminal Law* followed Holmes' book by two years. In the earlier work, Stephen distinguished the popular from the legal meaning of crime. In the former sense a crime "means an act which is both forbidden by law and revolting to the moral sentiments of society."⁷⁹ In the latter, crimes are neuter "acts forbidden by the law under pain of punishment."⁸⁰ The discussion shifts between these poles, but on the whole, it is clear that Stephen preferred the former—and without regarding it as merely popular. He asserted that "the administration of criminal justice is based upon morality. . . . It is, therefore, absolutely necessary that legal definitions of crime should be based upon moral distinctions. . . ."⁸¹ In the *History*, his analysis of punishment and its justification considerably reenforced his earlier position. It consists largely of a refutation of "some modern writers of eminence . . . [who] have been in the habit of regarding criminal law as being entirely independent of morality,"⁸² and his discussion of criminal responsibility, which strongly supports his view, is one of the best in the literature on that subject.⁸³

This much, however, must be stated emphatically in favor of Holmes' theory: if the criminal law is to be administered humanely, we must be ever conscious of the possible margin of error that dominated Holmes' thinking and, long before him, had led mediaeval inquisitors to insist on confession. It constitutes a permanent challenge to all claims to knowledge that rest on observation of human conduct. It is represented in the insight that language is frequently employed not as a vehicle to communicate facts but as a mask, deliberately to conceal and disguise them. There are marginal instances where vast cultural differences or fraud or some unknown ailment creates a wide disparity between inner states and external conduct. But the inevitable limitations

79. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND (1863)

3. ALSO 1 HISTORY OF THE CRIMINAL LAW (1883) 5.

80. STEPHEN, *op. cit. supra* note 79, at 4. Cf. 1 HISTORY OF THE CRIMINAL LAW 1.

81. GENERAL VIEW 82. But cf. *id.* at 6.

82. 2 HISTORY OF THE CRIMINAL LAW 79.

83. 2 HISTORY OF THE CRIMINAL LAW 94-123.

A major difficulty involved in comparing Holmes and Stephen resides in the ambiguity of the term "morality." In both writers it sometimes means moral attitudes, mores or public opinion, and at other times it means ethics—objective moral principles. That Holmes recognized the distinction is apparent from his well-known observation that "The first requirement of a sound body of law is, that it should correspond with the actual feelings of the community, whether right or wrong." (COMMON LAW 41). There is considerable agreement between Holmes and Stephen as to correspondence of the criminal law and moral attitudes—both as to the fact of such general correspondence in the existing law and as to the desirability of that. The chief difference between them is that noted in the text.

on our knowledge do not support the conclusion that in the vast majority of judgments based on rational methods of investigation, there is no reasonably accurate correspondence. The whole law of evidence is a studied effort to cope with this fundamental problem and its justification rests on the high probability of a "sufficiently" accurate representation of inner states by external conduct. This premise is accepted not only in law, but throughout every avenue of social life. It rests ultimately on the essential uniformity of human nature, and is so deeply ingrained in our daily experience that it is hardly possible even to conceive of social intercourse founded on its rejection.

The conclusions reached contradict Holmes' theory in its most sweeping generalization. The "normal" correspondence between external conduct and inner state negatives the uncompromising view that criminal liability is unmoral. Consequently, if, as is submitted, Holmes radically misinterpreted *mens rea*, the major doctrine of penal liability, the correction suggested places the entire field in a proper general perspective. It becomes possible then to appraise the significance of such ideas as "intention," "recklessness" and "negligence" in the fundamental rules of liability of advanced legal systems. It becomes feasible and it is necessary, next, to examine those issues of lesser generality, the specific doctrines, noted above, which Holmes relied upon to sustain the full sweep of his theory. In refuting Holmes' broad thesis, one is tempted to support an opposing but equally general position. But there is no logical or other compulsion that thus restricts the choice of alternatives. In the writer's view, to be elaborated, the most defensible position, stated broadly, is that the more general doctrines of the criminal law are founded on principles of moral culpability, and that various segments of the criminal law, some of them very important ones, are not unmoral, they are definitely immoral.

With reference to Holmes' interpretation of the defense of coercion to a homicide (self-preservation), we need merely to note that the law has changed since he wrote—if it ever was as he stated.⁸⁴ The utility of the present rule may be doubted, but far from being unmoral, it represents a very high morality since it enjoins us to meet death ourselves rather than to kill an innocent human being.⁸⁵

As to the rule that ignorance of the law is no defense, it must be recognized that this doctrine in its bald paper formulation is not merely unmoral, it is definitely immoral. But the significant fact is that Holmes, rejecting Austin's reason for supporting the doctrine, namely, difficulty of proof, believed that "ignorance of the law could never be

84. See 1 Hale, *PLEAS OF THE CROWN* (1716) 51.

85. Cf. 2 Stephen, *HISTORY OF THE CRIMINAL LAW* 107-108.

admitted as an excuse, even if the fact could be proved by sight and hearing in every case."⁸⁶ The "true explanation" is simply the law's indifference to the accused's particular temperament, knowledge, etc. To carry final conviction, he was content to observe that "public policy sacrifices the individual to the general good."⁸⁷ It is submitted that correct appraisal of the rule should begin with recognition of its potential injustice. This seems clearly to be implied by Austin's rationalization which stressed practical obstacles in the way of reform. Next, it is important to note that the courts have taken numerous exceptions to the broad formula. Indeed it may be hazarded, in addition, that current administrative practices modify the rigor of the written rule so generally as to render its inconsistency with the basic principles of culpability almost tolerable. Finally, as to the major crimes and the severer penalties, the consciences of most persons and their familiarity with traditional mores may be assumed almost as assuredly as the normality of the ordinary mental processes. These impose large empirical limitations on the rigor of the rule in its actual operation. But despite all of the above, there remain various phases of the doctrine that are opposed to present morality, and a diverse mass of case law that should challenge sharp reform of this ancient dogma.⁸⁸

Next, we must recognize certain limitations on Holmes' frequent insistence that the law "takes no account of incapacities" short of infancy or madness. Its chief support is in the law of negligence, which will shortly be discussed. But we may note directly that on the very face of his remark is the admission that the rules *do* take account of infancy and diseased mentality. If expediency were the sole foundation of criminal liability, would any such exception be allowed? Infants and insane persons are sometimes more dangerous and destructive than sane persons and those *sui juris*. Only their lack of capacity to understand, hence the absence of the basic conditions of moral culpability, can account for the legal rules freeing them from penal liability.

Moreover, it must be noted that Holmes' appraisal was based solely on those substantive rules of law which define offenses and prescribe the penalties. He ignored the many stipulations for mitigation that abound in the modern criminal law. It is apparent, also, that his criticism ignores the necessary conditions for formulation of any rules of law, *i.e.*, the formal necessity of any modern legal system to rely on broad gen-

86. COMMON LAW 48.

87. *Ibid.*

88. See Keedy, *Ignorance and Mistake in the Criminal Law* (1908) 22 HARV. L. REV. 75; L. Hall and Seligman, *Mistake of Law and Mens Rea* (1941) U. OF CHI. L. REV. 641.

eralization.⁸⁹ In consequence of this essential nature of modern rules of law, the only possible limit on culpability is such incapacity as bars any liability whatever. Liability extends to the full range of these limits, but there are infinite degrees of liability, and the avenues to the individual determinations are provided not only by laws on parole, probation, suspended sentence and the like, but, also, by the minimum-maximum penalties, written into the defining laws themselves. The clear presumption of such far-ranging penalties for the same offense is that individual differences, inhering in the particular temperament, understanding, and social situation of each defendant are to be considered. Almost by definition, adjudication in such matters is the proper sphere for individualization—by judge, jury and board. Holmes completely ignored the entire relevant process of administration.

On the other hand, it must be conceded that some of the rules on provocation comprise objective standards, *i.e.*, they ignore actual individual limitations. Holmes did not point out that the rules require actual provocation, *i.e.*, they require that the defendant was, in fact, so aroused as to have lost control of his conduct. This phase of the rules has special significance for superior persons. Their import is that even though a reasonable man would have been emotionally unbalanced, yet, if the particular defendant on trial was not actually provoked, he can take no advantage of the doctrine. This does not directly involve the issue Holmes was arguing but it does reveal an application of the rules which does not operate to the disadvantage of the weak. Characterization of the other phases of the doctrine as unmoral is also highly dubious. The particular stress of Holmes' criticism was on those rules which permit no diminution of liability even in situations that, in fact, provoke "reasonable" men, *i.e.*, certain words are conclusively presumed not to constitute provocations. A few states have rejected this rule as unfair, and it is not unlikely, also, that a study of sentences and of punishment actually administered would reveal considerable mitigation in such cases. But the chief point is that this phase of the doctrine cannot be dogmatically characterized as unmoral. On the contrary, its defect, if any, resides in its imposition of too high a standard of morality. It would hardly be contended that the Golden Rule is unmoral because only a small minority live by it; by like token the prevailing legal rule as to provocation by words cannot be dismissed as unmoral on the ground that "many people would rather die than suffer them (the most insulting words) without action."⁹⁰ If the application of the rule is vulnerable from a moral viewpoint, it is because the burden of restraint

89. See PLATO, STATESMAN 295.

90. COMMON LAW 61.

is unequal in light of human differences in ability to control conduct. Holmes' attack on it is not on this ground but because "every man of his standing and education" would have actually been aroused, *i.e.*, he attacks it on the ground that being even a "reasonable man" is no defense. The debatable question is whether this rule as well as that which requires a man to choose his own death rather than to kill an innocent human being does not set so high a moral standard as to be nugatory in their effects, although, in the writer's view, both rules can be defended even on purely utilitarian grounds.

More difficult to justify is that phase of the doctrine which falls within the orbit of legal provocation but limits its operation to "reasonable" persons. The same problem is presented with regard to "cooling time," which again is measured by the external standard of a "reasonable man." A related situation which Holmes omits, though he might have relied upon it, is the requirement that mistake of fact must be "reasonable" to constitute a defence.⁹¹ With reference to mistake of fact, legal provocation, and "cooling time," it should be noted that we here deal with persons who admittedly have caused major harms. In the provocation cases the issue is whether the crime is murder or manslaughter—the defendant admits a culpable homicide. In mistake of fact, the defendant admits commission of a harm, usually serious, and seeks complete avoidance from legal liability by asserting a privilege, *e.g.*, of self-defence, that is normally limited to persons who are actually attacked. In these cases, the import of the law—it may be a hardly conscious one, perhaps it is solely an emotional conviction—is that when a person intentionally inflicts a serious harm, he should act at special peril. He must take the risk that he is mistaken in such circumstances to the extent that when so engaged, he must act reasonably. Even less does a hot-tempered person who kills a human being, or an admitted offender, who nourishes even a "reasonable" provocation for an unusually long time stimulate desires to meet out impartial justice.⁹² Yet on reflection, it must be recognized that the rules of law in these matters fall short of the moral standards generally prevailing in the criminal law. Frequently the root of the difficulty is instability of personality or excessive excitability induced by physiological defects. In such cases, involving persons who do not fall within the recognized classes of legal incapacity, it seems especially unjust to impose the standards of normal men.

91. Holmes also fails to take account of the ethical import of the rule that reasonable mistake of fact is a defence.

92. "It would seem to follow from your proposition [defendant's counsel's, that the defendant was of defective mental balance, though not insane] that a bad-tempered man would be entitled to a verdict of manslaughter where a good-tempered one would be liable to be convicted of murder." Avory, J. in *The King v. Lesbini* [1914] 3 K. B. 1118.

The rules imposing such liability as well as the exceptional doctrines on ignorance of law, mistake of fact, and provocation find collateral support in the difficulties of proof. This aspect of the problem can be analyzed most readily in connection with negligence—the realm, *par excellence*, of objective liability.⁹³ The larger problem, concerning negligence and the above exceptional doctrines, results from their relationship to the general principles of moral culpability. Indeed a fuller understanding of the foundations of tort and criminal liability requires analysis of these principles.

THE GENERAL PRINCIPLES OF CULPABILITY

Any legal system that excepts individuals from liability for harms they cause, does so in reliance upon certain principles of “culpability.” These principles comprise a body of value-judgments formulated in terms of personal responsibility. They limit the general defining rules, and are stated separately merely for convenience. While, obviously in penal law, the limitations on culpability express judgments as to who ought to be punished, it is equally true that in torts, also, the rules imposing limitations on the liability of all persons, as well as on that of special classes of persons, rest on moral judgments regarding the justice of compensation, which, in the usual expression, signify who ought to bear various losses. But it by no means follows that the value-judgments underlying torts and criminal law are identical or even closely related.

Our first step in understanding the rationale of these legal rules in both fields must concern itself with the general import of culpability in its simplest customary meaning. Such an inquiry directly encounters some of the most ancient ideas of western culture, and especially that view of human nature which regards man as a being endowed with reason and able, within limits, to choose one of various possible courses of conduct. Intelligence and will, together with the corollary of freedom of action, are the traditional connotations which have persisted, more or less challenged, throughout the entire history of civilized thought. Whatever the merits of the controversies on the above perennial foundations of religion, philosophy and psychology may be, they have been embodied in our criminal law at least since the 13th century. The controversial literature on these matters is vast, but certain conclusions, though debatable, are pertinent. The above view of the common aspects of human nature can be stated in terms of various modern psychologies; in addition, even so-called “faculty psychology” is far from being out-

93. This is discussed in Part II of this paper, to appear in the December issue of the *REVIEW*.

moded.⁹⁴ As regards "determinism," the point to be stressed is that punishment is not thereby excluded, though there is much confusion in the literature because such terms as "social defense" and "treatment" are used arbitrarily. In any event, even on the premise of determinism, punishment is usually "explained" partly because it is the "natural" reaction of the community, partly because it provides a beneficent social environment for potential offenders whose conduct is thus "determined" away from criminality, and partly because punishment may so modify an offender's established pattern of conduct as to reform him. In consequence, neither social science nor modern philosophy renders untenable the assumption, at least, of a limited area of freedom, sufficient for continued validity of the above traditional ideas. The major alteration by modern social science in this regard is quantitative, *i.e.*, the degree of individual freedom is now widely regarded as much more limited than the tradition had it, and the effect has been to bring numerous sociological factors into any estimate of an offender's conduct and thus to modify and adapt his punishment accordingly.

The most difficult phase of the traditional psychology concerns the relation of intellect to will, and the metaphysics of that problem is involved and contradictory in mediaeval scholasticism alone. The ideas which have been incorporated into our criminal law represent common sense versions of the traditional metaphysics. The net relevant conclusion is that it is just to punish those who have knowingly committed moral wrongs, proscribed by law. The limitation of legal prescription on the application of the more general principle, besides requiring conduct, invokes ideas concerning "the limits of effective legal action" on the one hand (which accounts for the exclusion of considerable areas of immoral conduct from the reaches of the legal order) and, on the other hand, certain constitutional and ethical ideas embodied in *nulla poena sine lege* (which accounts for the fact that whereas torts has largely remained case law, criminal law has been more and more confined to statutes). Within the limits thus imposed by the nature of its functions and distinctive instrumentalities and by the above constitutional doctrine, our criminal law rests precisely upon the same foundation as does our traditional ethics: human beings are "responsible" for their volitional conduct. In the accepted legal terminology, certain consequences (proscribed by positive laws) should be "imputed" to any human being who has "caused" them, *i.e.*, who has directed his conduct towards the forbidden ends, or, at least, knew that the forbidden consequences would probably result.

It has been anciently recognized, also, that one can deliberately re-

94. See Pratt, *Faculty Psychology* (1929) 36 PSYCH. REV. 169.

frain from external conduct. One can "will not to will," *i.e.*, there can be an internal decision not to move externally. Such situations (Austin's forbearance) characterized by deliberate inaction, clearly meet the conditions of moral culpability.

To assert that a harm was "intentional" means not only that the end produced, but, also, that each step necessary thereto was sought or known to be probable. There are, however, situations where the harm produced was not intended, but where it was intended to act in ways that were known to increase the normal risk of injury to others.⁹⁵ This conduct participates in that of intentional harm in being volitional in an improper direction. But it was not accompanied by an intention to injure any person whatever or by knowledge that such injury was not unlikely but rather by an estimate that no person would, in fact, be injured. (This situation must not be confused with that wherein the actor does intend to produce an injury, but is indifferent as to which particular person shall be hurt, *e.g.*, indiscriminate firing into a crowd.) Accordingly culpability is involved, but to a lesser degree. Hence it is desirable to distinguish the corresponding situations and this is done by designating the misconduct as "reckless" rather than intentional.⁹⁶

The corollary of the above fundamental axiom of ethics, that moral culpability is posited on volitional conduct, is that it rests *only* on such conduct.⁹⁷ At a very early date⁹⁸ this was taken to require freedom from legal liability for mere accidents—and this advance marks the infiltration of ethical ideas into primitive law. Much later, but not nearly so recently as is sometimes believed, "negligence" appears as an additional basis for determining liability. It is this concept that provides the greatest challenge to any system of legal liability based on moral blame. For the one certain attribute of negligent behavior is that it must be contrasted with intentional conduct, *i.e.*, one of its essential qualities is the absence of "intention." This is the gist of Salmond's argument that negligence is a "state of mind" and much of the controversy thereon turns on mere questions of terminology. If "state of mind" means an active process, then negligence is not such a state. On the other hand, it is necessary to take account of "state of mind" in describ-

95. It "must . . . indicate an attitude of mental indifference to obvious risks." Eve, J. in *Hudston v. Viney*, 1 Ch. 104 (1921).

96. Clearly the problem of proof is especially difficult here, which accounts for the diversity of verdicts in cases involving "criminal negligence" and recklessness in civil actions. See *infra* note 135. But the distinctions drawn are analytically valid, and they are commonly verified in personal introspection.

97. "The law has no cognizance of unintentional offences." SOCRATES, APOLOGY 26. Cf. "... negligence is a sin." ST. THOMAS AQUINAS, SUMMA, II-II, Q. 54, Art. 1.

98. Cf. NUMBERS 35: 20-24; PLATO, LAWS IX, 862, 865.

ing negligence since the term means not only that the conduct in question fell below a certain objective standard, but, also, as noted, that it was not intentional. Negligence can thus be designated as a state of mind in the sense that a person's total mental processes did not include an intention (or knowledge) to effect certain harms. Whatever the terminology, it is certain that this is an essential implication of "negligence."

But judgments in terms of "good" or "bad" are simply meaningless if applied to involuntary behavior, and this has been stipulated in texts defining "act" as a manifestation or movement of the will. From Aristotle and the scholastics to the present, perhaps the most difficult of all ethical problems has been posed by sheer inadvertence rather than by deliberate omissions, and the rationalization of popular judgments has been highly ingenious. Since volitional conduct was deemed essential to moral culpability, effort was strained to push the negligent behavior back in time and to a point where it could be asserted with some degree of plausibility that the individual deliberately set upon the wrong path. Thus, though he behaves in ignorance and inefficiently, yet if he could have known and acquired skill, had he not sometime in the past willed wrongly, he is culpable for not having done so and hence for the present misconduct as well⁹⁹—even though it is now impossible for him to exercise due care. "*Non scire quod scire debemus et possumus culpa est.*" While there is undoubtedly a degree of validity in this view, it seems to have been much over-extended; in modern times we are far more willing to see widespread incompetence without the slightest taint of moral culpability.¹⁰⁰

The outcome of the brief survey above is the basic doctrine that, insofar as legal rules rest on moral culpability, they must be confined to volitional misconduct. Some sort of "treatment" may defensibly be applied to persons who are not morally culpable, but this cannot, on the above premises, be punitive in nature, however euphemistically it is described. These conclusions provide ready guides in penal law, but the intriguing questions that persist, unanswered, concern the nature of the civil sanctions, and whether there exists some rational basis for the imposition of such sanctions other than that of moral culpability.

The striking fact about the torts and criminal law rules on "culpability" is that both refer to the above common set of ideas, designated by identical terms: intention, recklessness, negligence (and strict liability). "Intention" denotes numerous harms that suggest an obvious common ground. "Recklessness" gravitates between intention and neg-

99. ARISTOTLE, ETHICS Bk. 3, c. 5, 1114a, 15-23.

100. Arguments pro and con are summarized by SCHMIDT, FAUTE CIVILE ET FAUTE PÉNALE (1928) 96-97.

ligence rather differently in the two fields: in criminal law it is important especially in involuntary manslaughter, whereas in torts this notion functions in a vast array of wrongdoing where it is frequently held equivalent to "intention." As to strict liability, there are in criminal law the *mala prohibita*, and in torts, the large field of objective risk, or, as it is more usually designated, of "action at peril." Thus, on the surface, at least, there appears to be a close correspondence between the entire law of crimes and that of torts by reference to a common set of principles of culpability. But, even at the outset, it is apparent that the above correspondence, though significant as regards the possibility of a unified classification or, at least, as the basis for important comparisons, by no means implies that the doctrines of the two fields of law are identical. At each point of common reference, it is possible that crimes go in one direction, torts in another. We do know in a general way, that criminal law is chiefly concerned with intentional harms whereas negligence bulks large in tort law. Is this a fortuitous circumstance, or does it have general significance?

[TO BE CONCLUDED]